86-6 38 (1)

No. ____________

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CLARK OIL & REFINING CORPORATION,

Petitioner,

v.

GO-TANE SERVICE STATIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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October 15, 1986

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QUESTIONS PRESENTED

(1) Where a gasoline refiner charged a wholesaler higher prices than allowed by federal law, causing the wholesaler to incur either overcharges for gasoline purchased or lost profits for allocated gasoline not purchased due to the price, may the courts allow recovery of lost profits if recovery of overcharges is barred by the applicable statute of limitations?

(2) Where the trial court ruled as a matter of law that both overcharge and lost profits claims were not time-barred because a continuing violation theory applied, may the Court of Appeals, upon holding the continuing violation theory inapplicable, disregard record evidence that the lost profits claim in fact accrued before the limitations period?

RULE 28.1 LISTING

Clark Oil & Refining Corporation is wholly owned by Apex Oil Company, a Missouri partnership comprised of the following general partners: Novelly Oil Co., a Missouri corporation, and Goldstein Oil Co., a Missouri corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioner Clark Oil & Refining Corporation petitions this Court to review the judgment of the Temporary Emergency Court of Appeals of the United States, entered in this action on July 31, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals upon rendering of the judgment sought to be reviewed, dated July 31, 1986, is reported at 798 F.2d 481 (Temp. Emer. Ct. App. 1986), and is reproduced in the Appendix to this Petition at A-1. The unpublished memorandum opinion and order of the District Court granting in part and denying in part petitioner's motion for summary judgment based upon the statute of limitations is reproduced in the Appendix at B-1. An unpublished order of the District Court denying petitioner's motion in limine regarding calculation of overcharges or damages,

based on the partial summary judgment, is reproduced in the Appendix at C-1. The unpublished order of the Court of Appeals denying Clark Oil & Refining Corporation's petition for rehearing and suggestion for rehearing *en banc*, entered on September 15, 1986, is reproduced in the Appendix at E-1.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals of the United States was entered on July 31, 1986. A timely petition for rehearing was denied by order dated September 15, 1986. This petition for certiorari has been filed within 30 days of the date of that denial. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

This action was brought under sections 210 and 211(a) of the Economic Stabilization Act of 1970, 12 U.S.C. §1904 Note (1980) as incorporated into section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§751 *et seq.* (1976). These statutory provisions are reproduced in the Appendix at G-1. The applicable statute of limitations, Ill. Rev. Stat. Ch. 110 ¶13-205, is also reproduced in the Appendix at G-2.

This case also involves a number of regulations promulgated under the federal Acts indicated above, including:

1. 10 C.F.R. §210.1 (as published in 39 Fed. Reg. 1924, 1931 (January 15, 1974)).

2. 10 C.F.R. §210.62 (as published in 39 Fed. Reg. 1924, 1931 (January 15, 1974) and 39 Fed. Reg. 5311 (February 12, 1974)).

3. 10 C.F.R. §211.11 (as published in 39 Fed. Reg. 1924, 1933 (January 15, 1974)).

4. 10 C.F.R. §211.24 (as published in 39 Feu. Reg. 1924, 1936 (January 15, 1974)).

5. 10 C.F.R. §211.51 (as published in 39 Fed. Reg. 1924, 1936 (January 15, 1974)).

6. 10 C.F.R. §§211.101-.106 (as published in 39 Fed. Reg. 1924, 1944 (January 15, 1974)).

7. 10 C.F.R. §212.31 (as published in 39 Fed. Reg. 1924, 1950 (January 15, 1974)).

8. 10 C.F.R. §212.82(a) (as published in 39 Fed. Reg. 1924, 1952 (January 15, 1974)).

9. 10 C.F.R. §212.82(f)(1)(i) (as published in 39 Fed. Reg. 1924, 1953 (January 15, 1974)).

These regulations are reproduced in the Appendix at H-1.

STATEMENT OF THE CASE

On April 25, 1979, Go-Tane Service Stations, Inc. ("Go-Tane"), an unbranded wholesale buyer-seller of motor gasoline, filed this action against one of its suppliers, Clark Oil & Refining Corporation ("Clark"). Go-Tane alleged Clark had violated the price and allocation regulations promulgated under the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. §1904 note (1980), and the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§751-760(h) (1976), and sought recovery of overcharges and lost profits. Jurisdiction was predicated on Section 210 and 211(a) of the ESA, as incorporated in Section 5(a)(1) of the EPAA, and 28 U.S.C. §1331(a).

The price regulations upon which all claims were based first became effective on August 20, 1973, and were subsequently repealed on January 27, 1981. The rule applicable to refiners provided that a class of purchaser could not be charged more for gasoline than the weighted average selling price in transactions with that class on May 15, 1973 (May 15th WASP) plus certain cost increases. 10 C.F.R. §212.82. "Class of purchaser" meant persons to whom the refiner charged a comparable price pursuant to "customary price differentials" between those purchasers and other

purchasers. 10 C.F.R. §212.31. "Customary price differential" meant a price distinction based on "a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery." *Id.*

On January 15, 1974, allocation regulations were promulgated, effective immediately, which required refiners to supply their wholesale gasoline purchasers of record in 1972 with volumes proportionate to the volumes actually purchased in the corresponding month of 1972, based upon available supplies. 10 C.F.R. §§211.101 *et seq.* The normal business practices rule was promulgated at the same time, precluding suppliers from modifying any normal business practice so as to result in circumvention of the price or allocation regulations. 10 C.F.R. §210. This rule was amended on February 12, 1974 by expressly forbidding suppliers to engage in any form of discrimination among purchasers. At no time did the regulations require a wholesale purchaser to buy allocated gallons.

Go-Tane was purchasing gasoline from Clark at the time the first price regulations were promulgated and continued to do so until March, 1976. When the price regulations took effect, Clark erroneously calculated its maximum lawful selling price for Go-Tane's class of purchaser by using its August 20 posted prices instead of May 15 prices. This calculation resulted in the elimination of the customary price differential between Go-Tane's class of purchaser and Clark dealers, reversing a historical practice of favoring Go-Tane's class.

In the fall of 1973, Mr. Silveri, Go-Tane's President, had already concluded that the differential had been "destroyed," with the good possibility that Go-Tane was paying more for gasoline than Clark dealers at that time. (Trial Transcript at 215). The injurious effect on Go-Tane's business interests was immediate, causing Mr. Silveri to complain vigorously about the pricing practice in the fall of 1973 to anyone at Clark who would listen. (Trial Transcript at 127-28).

Beginning in January 1974, at the very inception of mandatory allocation, Go-Tane did not take its full allocation from Clark. Go-Tane purchased only 95,651 gallons from Clark in January 1974,

even though its allocated volume for one-half of January was 536,546 before a Federal Energy Office (FEO) upward adjustment. (Def. Exhs. 46A and 46B; Pl. Exh. 49; Clerk's Record 351). In February 1974, Go-Tane purchased only 1,424,795 gallons of the 1,509,384 allocated (*Id.*), while at the same time making a formal hardship request to the FEO for increases of its monthly allocations. (Def. Exh. 64A). For March 1974, Go-Tane's allocation was increased by the FEO from 1,433,746 gallons to 2,170,313 gallons (Def. Exh. 64B), but Go-Tane purchased only 645,468 gallons (Def. Exhs. 46A and 46B; Pl. Exh. 49). In April and May, Go-Tane purchased more than its full allocation, but then again purchased less than full allocation in June 1974. (Def. Exhs. 46A and 46B; Pl. Exh. 49; Clerk's Record 351).

At no time has Go-Tane claimed that Clark refused to sell it allocated gasoline. The Second Amended Complaint set forth six causes of action under the General Allocation and Price Rules, 10 C.F.R. Part 210, the Mandatory Petroleum Allocation Regulations, 10 C.F.R. Part 211, and the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212. The first count (I) claimed entitlement to overcharges based on the allegations that Clark charged Go-Tane higher prices than the maximum lawful selling price allowed under section 212.82 of the regulations by placing Go-Tane in the wrong class of purchaser, failing to preserve a customary price differential and improperly computing the May 15th weighted average selling price. The second count (II) claimed entitlement to overcharges attributable to Clark's alleged miscalculation of increased costs which could be added to the May 15 WASP under section 212.83. The third count (III) claimed entitlement to overcharges under section 210.62(a) as a result of Clark's elimination of an early payment discount. The fourth count (IV) claimed entitlement to overcharges attributable to Clark's alleged miscalculation of banked costs under section 212.83(h). The fifth count (V) claimed entitlement to lost profits and other consequential damages, alleging that Go-Tane "was unable to purchase" its full allocation of gasoline because of Clark's illegal prices, and therefore had to pay higher prices to non-base period suppliers and lost sales. The fifth claim was predicated on the normal business practice rule, 10 C.F.R. §210.62, and also alleged generally that Clark had violated the regulations by failing to make available at lawful prices

the quantities of gasoline allocated. The sixth count (VI) sought recovery of treble damages for willful violation of the regulations, but was withdrawn at the final pretrial conference.

As previously indicated, Go-Tane did not file this action until April 25, 1979, more than five years after Clark had first sold it gasoline at prices based on the erroneous May 15th weighted average selling price. Clark therefore filed a Motion For Summary Judgment on Claims Barred By Statute Of Limitations on February 27, 1984, contending that all claims predicated upon its erroneous use of August 20, 1973 posted prices rather than May 15, 1973 prices in calculating the maximum lawful selling price were time-barred.[1] Because the ESA contains no limitations period, the statute of limitations of the forum state applied. The parties agreed that the Illinois five year statute of limitations, Ill. Rev. Stat. Ch. 110 ¶13-205, was applicable to all but the treble damage claim.

On June 7, 1984, the court granted Clark's motion in part and denied it in part. (App. at B-1). The court dismissed the first claim (I) as time-barred, finding that Go-Tane knew already in 1973 that Clark had eliminated the customary price differential which had favored Go-Tane's class over other classes of purchasers. The customary price differential was eliminated when Clark used the August 20 price instead of May 15th prices in calculating its maximum lawful selling price. The third claim (III) was also dismissed, based on the finding that Go-Tane knew of Clark's decision to eliminate the early payment discount well before April 25, 1974, upon receipt of the first invoice that carried no discount. As to the remaining claims not based solely on the May 15th weighted average selling price error, the court concluded the claims were in the nature of "plain" overcharges, citing *Johnson Oil v. U.S. Department of Energy*, 690 F.2d 191,196 (Temp. Emer. Ct. App. 1982). Although Go-Tane could recover on the remaining claims

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[1]Go-Tane conceded that until December 1, 1973, Clark correctly relied upon the refiner/reseller price rule pursuant to which Clark used the August 20 price in determining the maximum lawful selling price. *See* 6 C.F.R. §150.359, 38 Fed. Reg. 22536 at 22542 (August 22, 1973). The parties agreed that Clark first became subject to the refiner price rule on December 1, 1973.

under a continuing violation theory, its recovery for both overcharges and lost profits was limited to those occurring on or after April 25, 1974.

When Go-Tane then announced an intent to continue predicating its claims on correction for the May 15th WASP error, Clark moved for an order ruling inadmissible any evidence of calculations or damages that used any amounts for the May 15th WASPs other than those actually used by Clark. On July 26, 1984, the trial court clarified its decision on summary judgment, but did not reverse it. (App. at C-1). The trial court stated that the summary judgment had limited Go-Tane's remaining claims to prevent Go-Tane from advancing a series of claims categorized as "banked cost," "willful overcharge," "improper cost increase allocation," and "normal business practices," when in fact each might be based solely on the same conduct of Clark. However, if Go-Tane could demonstrate that a particular overcharge resulted from some additional error or misconduct by Clark, Go-Tane would not be limited to Clark's August 20th prices as to claims II, IV and V.

With the June 7 and July 26 rulings, the trial court had completely disposed of Clark's statute of limitations defense as a matter of law. Under these rulings, either (1) Clark would be entitled to a directed verdict on all claims if the overcharges incurred by Go-Tane resulted solely from Clark's initial decision to utilize an improper May 15th WASP or (2) Go-Tane could recover all overcharges and lost profits under the continuing violation theory if it could demonstrate additional error or misconduct by Clark. (App. at C-1). The trial court did not revisit the summary judgment again. Go-Tane has not at any time appealed the summary judgment decisions.

Trial began on October 29 to a jury. During trial, Go-Tane submitted two briefs in support of its claim for lost profits which asserted that Go-Tane was not precluded from purchasing its full allocation until June 1974. The briefs were not relevant to any pending motion, nor did the trial court give the briefs any attention or address the issues raised. At the conclusion of the case, the jury was instructed, over Clark's objection, that overcharges and lost profits could be awarded for all errors, including the May 15th

weighted average selling price error, if Clark made additional errors in violation of the price regulations causing additional overcharges after April 25, 1974. On November 8, the jury rendered its verdict for Go-Tane in the amount of $279,667 for overcharges and $2,967,466 for lost profits, having found that Clark had made other errors in addition to the May 15th WASP error. Judgment was entered against Clark in the amount of $3,247,133 on November 8, 1985.

Clark filed its appeal to the Temporary Emergency Court of Appeals on December 9, 1985. That court, in its decision issued July 31, 1986, overruled the district court's decision that Go-Tane's overcharge claims stated in Counts II and IV constituted "plain overcharges" and therefore held the continuing violation theory inapplicable. As a result, all claims for overcharges were held barred by the statute of limitations because they all arose from Clark's use of an incorrect May 15 weighted average selling price, an act which occurred and caused injury more than five years before suit was filed.[2]

On the lost profits claim, Count V, the court rejected Clark's argument that because this claim, like all overcharge claims, was predicated on the erroneous May 15th WASP and consequent injury, the cause of action also accrued before April 25, 1974. Instead, the Court held that the cause of action first accrued when Go-Tane suffered "allocation damages." Although the jury had made no finding on when Go-Tane first did not purchase its full allocation because of Clark's prices, the court ruled that the trial court would be deemed to have made a finding on that issue in accordance with the judgment under Federal Rule of Civil Procedure 49(a) since Clark had not requested a special verdict on the issue. In addition, the court concluded the record evidence established Go-Tane had not suffered allocation injury until June, 1974, finding that the fact Go-Tane purchased less than a full alloca-

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[2]The court concluded there was no substantial evidence that any additional errors after April 24, 1974 could have contributed in any significant degree to the overcharges found by the jury.

tion from January, 1974 through March, 1974 was "neutralized" by its purchase of more than its allotment from Clark in April and May, 1974.

Clark's Petition For Rehearing and Suggestion For Rehearing *En Banc* was denied on September 15, 1986.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEAL'S DECISION CONFLICTS IN PRINCIPLE WITH A DECISION OF THIS COURT AND DECISIONS OF OTHER COURTS OF APPEALS BASED ON STATE COMMON LAW.

This Court, in *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, *reh'g denied*, 401 U.S. 1015 (1971), adopted the principle that a cause of action under federal antitrust laws accrues and the statute begins to run "when a defendant commits an act that injures a plaintiff's business." *Id.* at 338. The accrual of the cause of action then entitles the plaintiff to recover not only the damages which he has suffered on the date of accrual but also those which he may suffer in the future from the particular invasion. *Id.* at 338-339. Only when the fact of the accrual of future damages is speculative or their amount and nature are unprovable does the accrual of new damages give rise to a new cause of action. *Id.* at 339-40.

The Court of Appeals misinterpreted *Zenith* as establishing the principle that when an unlawful act does not immediately cause the *type of injury* sued for, the cause of action does not accrue until that injury has occurred. This interpretation — the holding of the Court of Appeals — allows the revival of a stale claim otherwise time-barred as long as the plaintiff can prove that some new form of damages occurred within the limitations period, even if those damages were predictable with the first injury.

In this case, the Court of Appeals allowed recovery of lost profits ("allocation damages") even though the unlawful conduct giving rise to such damages occurred and first caused Go-Tane

injury well before the limitations period. Moreover, contrary to the *Zenith* principle, the court allowed recovery of lost profits even though the possibility that Go-Tane would suffer lost profits rather than overcharges as its damages existed from the outset of mandatory allocation.

The claim upon which Go-Tane sought recovery of lost profits was predicated on three elements, all of which existed upon promulgation of the allocation regulations in January 1974: (1) Clark's failure to price its products in compliance with the refiner price rule and the normal business practices rule, (2) injury to Go-Tane as a result, and (3) Go-Tane's legal right to purchase the quantities of gasoline allocated to it. Already in August 1973, Clark's decision to use the August 20 price as its May 15th WASP resulted in immediate injury to Go-Tane by eliminating the favorable customary price differential. This elimination of the price differential constituted Clark's violation of the normal business practices rule. In December, 1973, when Clark became subject to the refiner price rule, this same decision regarding the May 15 WASP resulted in overcharges to Go-Tane. When Go-Tane then acquired allocation rights in January 1974, the erroneous May 15 WASP had yet another consequence. The allocation right afforded Go-Tane a choice — it could continue to pay unlawful prices based upon the May 15 WASP error or it could seek gasoline supplies elsewhere, secure in the knowledge that if it did, it could subsequently recover any profits lost. Whichever avenue Go-Tane chose, it would suffer legal injury because of Clark's unlawful practice.

The time at which Go-Tane in fact incurred lost profits, or "allocation damages," is of no legal significance to the accrual of its cause of action. Once the allocation regulations came into being, the possibility existed that Go-Tane would incur lost profits. Not only was it a possibility, but it was possibility only Go-Tane controlled. For every gallon of gasoline allocated to it, it would either incur overcharges if the gallons were purchased from Clark or it could recover lost profit if the allocated gallons were not purchased from Clark. Go-Tane's cause of action was complete, and therefore accrued no later than January, 1974.

The Court of Appeals determination that the accrual of a cause of action depends upon when the type of damages sought to be recovered are actually incurred, not when the unlawful conduct first causes injury, conflicts with the decisions of other courts of appeals based upon state common law. In a suit claiming defamation, conspiracy to injure reputation, and emotional distress arising from two television news broadcasts, the Fourth Circuit decided all personal injury claims accrued under Virginia law when the broadcast occurred, even though the plaintiff did not learn of the broadcast and become emotionally upset until nearly two years later. *Brown v. American Broadcasting Co.*, 704 F.2d 1296 (4th Cir. 1983). If the plaintiff was defamed or her reputation was damaged, the injury occurred when people watched the broadcasts and recognized the plaintiff. The emotional distress plaintiff suffered two years later, the only injury occurring within the two year limitations period, was only an additional injury arising from the same wrongful act. Therefore, the court held all these claims barred based on the principle that once a cause of action is complete and the statute of limitations begins to run, it runs against all damages resulting from the wrongful act, even damages which may not arise until a future date.

In *Granahan v. Pearson*, 782 F.2d 30 (4th Cir. 1985), another analogous case, the court held that a malpractice action was barred under Virginia law even though the plaintiff first became sterile within the limitations period as a result of her doctor's failure to remove her IUD. The court concluded she was first injured outside the limitations period when treated for an infection and the statute began to run from the date of her last visit to her doctor. The court reasoned that it could not allow the plaintiff to split the initial injury from consequential injury to meet the statute of limitations deadline. *Id.* at 32-34.

The same principle has also been applied in contract actions.[3] In *Ford v. International Harvester Co.*, 339 F.2d 749 (9th Cir. 1968), the plaintiff, an equipment dealer, sued to recover damages for a manufacturer's breach of an exclusive dealership agreement. The breach occurred when the manufacturer contracted with another equipment dealer to establish a new operation within the plaintiff's exclusive territory. The plaintiff did not bring suit until after he had liquidated the business and accepted termination of his dealership with the manufacturer. Although the liquidation and termination occurred within the limitations period, the breach did not. The court held the action was time-barred because the plaintiff's action accrued under Washington laws with the breach, reasoning that the subsequent damages were not severable from the original cause of action. *Id.* at 752.

In this case all of Go-Tane's damages, regardless of form, were incurred as the result of Clark's May 15th weighted average selling price error. Upon establishment of the mandatory allocation programs, Clark's unlawful pricing practice was comparable to a breach of a pricing term in a supply contract. In accordance with established common law principles, Go-Tane's cause of action for recovery of lost profits accrued with Clark's breach of its legal obligation to supply gasoline at a lawful price. The breach occurred in January, 1974 when Clark failed to supply gasoline at a lawful price, causing overcharges as the first injury. Damages subsequently suffered by Go-Tane cannot be severed from that original cause of action.

The Court of Appeal's departure from the *Zenith* principle and the common law has impact for all federal law actions. Although an Illinois statute of limitations applies in this case because

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[3]It is a long-standing principle of common law that a contract cause of action accrues for statute of limitations purposes at the time of breach, regardless of whether subsequent or additional damages are incurred. *See*, e.g., *Rothmans Tobacco Company v. Liggett Group, Inc.*, 770 F.2d 1246 (4th Cir. 1985); *Aachen & Munich Fire Insurance Co. v. Morton*, 156 F. 654 (6th Cir. 1907); *National Hills Shopping Center v. Insurance Company of North America*, 320 F. Supp. 1146 (S.D. Ga. 1970); *Livingston v. Sims*, 15 S.E.2d 770 (S.C. 1941); *Department of Banking v. McMullen*, 278 N.W. 551 (Neb. 1938).

the ESA provides no limitations period, federal law controls the issue of when a cause of action accrues under the ESA or EPAA. *Ashland Oil Co. of Cal. v. Union Oil Co. of Cal.*, 567 F.2d 984 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978). The Court of Appeals, by establishing an accrual principle as a matter of federal law, has therefore created precedent that does not effect only cases arising under the ESA and EPAA.

II. BY ESTABLISHING THE PRINCIPLE THAT A CAUSE OF ACTION ACCRUES WHEN THE PLAINTIFF INCURS THE TYPE OF DAMAGES SUED FOR, NOT WITH THE FIRST INJURY, THE COURT OF APPEAL'S DECISION CREATES FEDERAL LAW THAT UNDERMINES THE FINALITY INTENDED BY STATUTES OF LIMITATIONS

Statute of limitations are, in essence, declarations that those who have slept for the specified time on their rights will not be permitted thereafter to assert them to the injury of others and the disturbance of society. *See St. Louis Public Schools v. Walker*, 76 U.S. (9 Wall.) 282 (1869). Apart from the merits of particular claims, the interest in certainty and finality, especially in commercial affairs, makes it desireable to terminate contingent liabilities at specific points in time. Creating this certainty and finality is the fundamental purpose of statutes of limitations.

The Court of Appeal's decision, by allowing a separate action for consequential injuries different in form from initial injuries, only serves to nullify the purpose of statutes of limitations. There is no finality and certainty if a party can revive a stale claim with proof of a new kind of damage, regardless of when the unlawful acts associated with the new damages occurred or when the plaintiff was first injured as a consequence.

With the court's analysis, it is difficult to envision when the sun will set on claims arising under the price and allocation regulations. based on acts which occurred years earlier. Claims under these regulations or any regulations for which multiple types of injuries

can occur, if of unlimited duration, have no finality at all. Thus the fact that these particular regulations were abolished in 1981 is fortuitous.

Congress created a private enforcement mechanism in the ESA and EPAA to insure the success of the economic controls it had enacted in an emergency. But Go-Tane's action, commenced years after its business interests were injured and when it was not even purchasing gasoline from Clark, has done nothing to further the public purpose of the legislation. Had Go-Tane responded promptly to Clark's regulatory infraction, Go-Tane would not have suffered lost profits. Had Go-Tane chosen to purchase its full allocation from Clark and incur overcharges rather than lost profits, this action would be barred in total. Instead, the Court of Appeals has allowed Go-Tane to recover its consequential damages by creating an anomaly that will only prolong the litigation of cases brought under the ESA and EPAA, or any other federal laws.

III. THE COURT OF APPEAL'S FAILURE TO REMAND THE CASE FOR A NEW TRIAL ON FACT ISSUES ARISING UPON ITS REVERSAL OF THE DISTRICT COURT'S DECISION THAT CLAIMS WERE NOT TIME-BARRED AS A MATTER OF LAW CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

The Court of Appeals relied upon Federal Rule of Civil Procedure 49(a) to disregard record evidence that Go-Tane first suffered "allocation injury" in January 1974, outside the limitations period. The court's reliance on Rule 49(a) would have been appropriate if the trial court had not ruled as a matter of law that recovery on claims II, IV and V would be allowed under the continuing violation theory. With this ruling and the subsequent jury instructions in accordance with the ruling, Clark's statute of limitations defense was rejected as a matter of law so long as Go-Tane could show any error or misconduct by Clark within the limitations period. At trial, fact issues of when Go-Tane first suffered either overcharge injury or allocation injury therefore were not decisive or even relevant. It was not until the Court of Appeals

overruled the trial court's opinion on the applicability of the continuing violation theory that the issue of first injury became relevant or decisive.

Because the Court of Appeals has held the continuing violation theory inapplicable[4], this case should have been remanded for a new trial on the issue of when allocation injury in fact first occurred. Particularly in light of the record evidence indicating allocation injury occurred before April 1974, the Court of Appeal's failure to remand the case for a new trial has produced an unfair result, and is unsupported by the case law under Rule 49(a). Rule 49(a) has been applied when an issue was not raised at trial, not when the trial court decided the issue as a matter of law and was subsequently reversed on appeal.

CONCLUSION

The Court of Appeals departed from established principles on the accrual of causes of action. Its decision undermines the fundamental purposes of statutes of limitations by allowing revival of claims otherwise time-barred if the plaintiff can prove a new form of consequential damages within the limitations period, even if those damages were predictable with the first injury. By relying improperly on Federal Rule of Civil Procedure 49(a), the court also disregarded record evidence which indicated that even the plaintiff's consequential injury had occurred outside the limitations period.

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[4]The Court of Appeals expressly held the continuing violation theory inapplicable to the price claims, relying on the numerous decisions of that court which hold that whenever an act with continuing effect causes initial injury, the statute is not tolled with respect to continued injury of similar character following from the same act. In affirming the judgment on the allocation claim, the court's rejection of the continuing violation theory was implicit from its reasoning in overruling the judgment for overcharges and the fact that it affirmed the judgment for lost profits not on the ground relied upon by the trial court on summary judgment but on the alternative ground that first allocation injury occurred within the limitations period.

This Court should grant the writ of certiorari not only to correct the erroneous and unfair result of this case but also to settle the question of when a cause of action for consequential damage accrues under the Economic Stabilization Act of 1970.

Respectfully submitted,

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Dated: October 15, 1986

APPENDIX

Temporary Emergency Court of Appeals of the United States

No. 7-16

GO-TANE SERVICE STATIONS, INC.,
PLAINTIFF-APPELLEE,

v.

CLARK OIL & REFINING CORPORATION,
DEFENDANT-APPELLANT.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

(C.A. No. 79-C-1674)

(Argued May 12, 1986 Decided July 31, 1986)

WAYNE E. BABLER, JR., with whom Nancy K. Peterson, Quarles & Brady, Milwaukee, Wisconsin, were on the brief for the Appellant.

JOHN B. WILLIAMS, Collier, Shannon, Rill & Scott, Washington, D.C., was on the brief for the Appellee.

Before CHRISTENSEN, JAMESON and MAXWELL, Judges.

PER CURIAM.

Go-Tane Service Stations, Inc. (Go-Tane), plaintiff-appellee, filed this action in district court on April 25, 1979, alleging violations of the Economic Stabilization Act of 1970 (ESA), section 210, 12 U.S.C. § 1904 note, as incorporated by reference in § 5(a) of the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. §§ 751-760(h), and seeking recovery of over-charges and lost profits. The claims were tried to a jury over the affirmative defense of Clark Oil and Refining Corp. (Clark), defendant-appellant, that the claims were barred by Illi-

nois' five year statute of limitations.[1] The jury returned a verdict in favor of Go-Tane for $279,667.00 gasoline overcharges and $2,967,466.00 lost profits. We reverse in part and affirm in part, holding (1) that the claims for overcharges arose more than five years before the commencement of the action and cannot be saved by resort to any continuing violation or kindred theory, and (2) that the claim for wrongful allocation injury first occurred within the five year period and was not barred or otherwise invalid.

I. *Background*

Go-Tane is an unbranded wholesale buyer-reseller of motor gasoline. Clark is a refiner of motor gasoline and was one of Go-Tane's principal suppliers, as well as the supplier of its own branded retail dealers. Prior to 1973, Clark sold gasoline to unbranded wholesale accounts such as Go-Tane at prices lower than the prices to its branded retail dealers.

On August 20, 1973, the regulations promulgated under ESA became effective. 10 C.F.R. parts 210-212.[2] The pricing regulations precluded a refiner from charging a price in excess of the maximum allowable price equalling the weighted average selling price (WASP) it charged to the respective classes of purchaser on (or if there were no sales on that date, last before) May 15, 1973, plus certain increased costs. 10 C.F.R. § 212.82.[3] Clark ad-

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[1] The parties agreed that the applicable statute of limitations was five years for compensatory damages. Ill. Rev. Stat. ch. 110 § 13-205.

[2] Part 210 contains "General Allocation and Price Rules," regulations applicable to both price and allocation regulations, 10 C.F.R. § 210.1. Part 211 contains "Mandatory Petroleum Allocation Regulations", and Part 212 contains "Mandatory Petroleum Price Regulations."

[3] The parties and the district court defined "base price" differently. The district court defined base price as the maximum allowable selling price. Go-Tane defined base price

mitted that it incorrectly used an August 20, 1973 WASP rather than the correct May 15, 1973 WASP, thus increasing prices charged Go-Tane with reference to prices charged Clark's own branded dealers, in reversal of its historical practice and substantially altering the price differential between the two classes.[4] Clark first overcharged Go-Tane in December 1973.

In its second amended complaint Go-Tane alleged six causes of action. The district court, in an order dated June 7, 1984, held that the statute of limitations barred recovery of overcharges for violation of the pricing regulations under count I caused by an overinflated May 15 WASP, improper classification of Go-Tane, and failure to maintain customary price differentials, and under count

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as the May 15 weighted average selling price. Clark correctly notes that:

> [The May 15 weighted average selling price] is sometimes referred to as the "base price." This term can be confusing . . . . Under the regulations, "base price" was defined as the May 15th WASP plus product cost increases, and "base price" plus *non*-product cost increases equalled the maximum lawful selling price, until February 1, 1976 when the term was dropped from the Refiner Price Rule altogether. *See* 10 C.F.R. § 212.82(f)(1). . .; 41 Fed. Reg. 15330 (April 12, 1976). It has never been defined as May 15th WASP in the regulations.

For our purposes we will define base price as defined in the regulations, and will refer to the May 15 weighted average selling price as the May 15 WASP.

[4] The parties stipulated that:

> (i) on August 20, 1973, the first day on which price regulations were in effect, Clark charged Go-Tane a price nearly $.08/gallon higher than its "May 15th price," and (ii) used this higher August 20, 1973 posted price ("August 20th prices") as its "baseline prices" in all subsequent "base price" calculations.

July 26, 1984 order, app. 202.

III, caused by the imposition of stricter credit terms. The district court further held that the statute of limitations did not bar recovery of overcharges for violation of the pricing regulations under count II, caused by improper product and non-product cost increases, and count IV, caused by improper recoupment of banked costs; nor did it bar recovery of lost profits for violation of the normal business practices rule under count V caused by the failure to maintain the customary price differential among classes of purchasers. Go-Tane withdrew count VI for recovery of treble damages at the final pretrial conference. The parties in their briefs collectively refer to counts I through IV as the price claims, and to count V as the allocation claim.

In a subsequent order, dated July 26, 1984, the district court in effect reversed its earlier holding. It reasoned that counts II and IV could not be proved without first proving violation under count I. At trial Go-Tane recovered on all alleged pricing claims and on the allocation claim.

II. *Issues on Appeal*

Despite the wide range and complexities of the briefing, the problems before us on this appeal are quite narrow, as follows:

(1) whether the district court correctly held that the statute of limitations barred neither the price claims nor the allocation claim;

(2) whether the district court correctly instructed the jury that failure to maintain the customary price differential violated the normal business practices rule, 10 C.F.R. § 210.62; and

(3) whether the district court abused its discretion when it permitted Go-Tane to use at trial expert computer computations not disclosed during discovery.

We consider these issues in order.

III. *The Statute of Limitations Bar*

A. *The Price Claims*

The statute of limitations begins to run when an act with decisive continuing effect causes initial injury at a given time, and the statute is not tolled with respect to continued injury of similar character following from the same act. *CPI Crude, Inc. v. Coffman*, 776 F.2d 1546, 1552-53 (TECA 1985); *Oerther v. Pennzoil Co.*, 763 F.2d 420, 421-22 (TECA 1985); *Lerner v. Atlantic Richfield Co.*, 731 F.2d 898, 901 (TECA 1984); *Western Mountain Oil, Inc. v. Gulf Oil Corp.*, 726 F.2d 765, 768 (TECA 1983); *Fleetwing Corp. v. Mobil Oil Corp.*, 726 F.2d 768, 770 (TECA 1983).

Each price claim alleged by Go-Tane hinges on an improper act initiated by Clark with knowledge and over protest of Go-Tane and with injurious consequences to Go-Tane more than five years before the filing of the action. *See Lerner*, 731 F.2d at 900. Count I stemmed from the misclassification of Go-Tane, count III from the discontinuation of favorable credit terms, both acts occurring prior to April 25, 1974. In its June 7 order, the district court appropriately found counts I and III barred by the statute of limitations. Likewise, improper product and non-product cost increases under count II and improper recoupment of banked costs under count IV resulted from the use of an incorrect August 20th WASP, an act occurring more than five years before the action was filed. See 10 C.F.R. § 212.83(c), (h). The district court should have disallowed recovery on all price claims predicated on a single improper act. *Lerner*, 731 F.2d at 900.

The district court, however, allowed recovery for all overcharges collected within the five year period upon the jury's determination that "in addition to the use of an incorrect May 15, 1973 price" Clark made other errors calculating the price charged to Go-Tane between April

25, 1974 and March 1, 1979, in violation of the Refiner Price Rule and that "these additional violations resulted in further overcharges beyond those resulting from the use of any incorrect May 15th price." Interrogatories (2) and (3), App. 303-304. Aside from the quantification of damages, the district court determined all other questions bearing upon the statute of limitations as matters of law.

Go-Tane attempts to sustain the district court's ruling on the price claims by simply repeating the court's *ipse dixit* that the overcharges here were "plain" within the meaning of *Johnson Oil Co., Inc. v. Doe*, 690 F.2d 191, 196 (TECA 1982), without attempting to define the term as employed in that case.[5] It argues that Clark made "errors in addition to the May 15, 1973 base price error [which] increased the amount of overcharges," and that "Go-Tane therefore sustained its burden of demonstrating 'plain overcharges.' "

Although *Johnson* did not refer to "plain overcharges," our subsequent decisions employed the term to distinguish *Johnson*.

> While *Johnson* lends some support to plaintiff's contention that in a plain overcharge action each alleged overcharge should constitute a separate cause of action, this court was not squarely faced with that issue in *Johnson*. The conclusionary language in the directions to the district court upon remand should not be broadly construed to constitute a holding that

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[5] Go-Tane also relies, in line with the district court's rationale, upon *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1017-18 (TECA), *cert. denied*, 434 U.S. 836 (1977). It contends that a claim for overcharge requires proof of the correct May 15 WASP as well as increased costs. This is not helpful. Irrespective of the number of pricing components necessary to establish an overcharge, the *Longview* problem of the insufficiency of findings as to one of them is irrelevant where, as here, the overcharges are conceded both in the district court and on this appeal.

> each overcharge amounts to a separate cause of action.

CPI Crude, 776 F.2d at 1553. The price claims presented by Go-Tane do not constitute plain overcharges, as the term was used in *CPI Crude*. The price claims, instead, resulted from an underlying act causing the claims to accrue at a time barred by the statute of limitations.

We need not speculate here concerning what the rule should be had both types of overcharges spanning the period of limitations been involved. Subsequent errors in addition to Clark's basic one were asserted by Go-Tane, but review of the record persuades us that there is no substantial evidence that they could have contributed in any significant degree to the overcharges found by the jury. The trial court itself made no finding with respect to this, and as has already been noted, submitted to the jury the questions of whether there were within the period of limitations errors in addition to the incorrect May 15 pricing and whether they resulted in additional overcharges, but asked for no quantification whatsoever, and understandably so in view of the insufficiency of the evidence.

We conclude that Go-Tane's claim for overcharges, as such, based as it was upon an unlawful pricing practice applied by Clark with knowledge and over protest of Go-Tane with consequent injury beginning more than five years before the filing of this action, was barred by the applicable statute of limitations.

B. *The Allocation Claim*

With respect to the allocation claim, count V of the second amended complaint, the statute of limitations problem is significantly different. While necessarily relating to the separate overcharge claim, the differentiating gist of its foundation is the general allocation and price rules, separately issued by the agency, and the es-

sentially different character and timing of the damages suffered by Go-Tane.[6]

Go-Tane alleged in its allocation claim that the actions taken by Clark against Go-Tane, including imposition of discriminatory and illegally high prices, constituted violation of the normal business practices rule, 10 C.F.R. § 210.62.[7] Go-Tane alleged these violations caused substantial damage, including lost profits, losses resulting from purchases from non-base period suppliers at higher prices, and other consequential damage. Essentially, Clark prevented Go-Tane from availing itself of its full allocation from Clark with consequent damages relating wholly to an occurrence within the statute of limitations period, the nature and amount of which, as found by the jury, are not questioned by Clark on appeal.

Go-Tane's allocation claim could not have arisen before Go-Tane was first injured as a result of that deprivation.

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[6] Although violations of part 210 entitled "General Allocations and Price Rules" are alleged, we shall follow the practice of the parties in generally referring to count V as the "allocation claim" because of its distinctive character as such.

[7] 210.62. Normal business practices.

(a) Suppliers will deal with purchasers of an allocated product according to normal business practices in effect during the base period specified in part 211 for that allocated product, and no supplier may modify any normal business practice so as to result in the circumvention of any provision of this chapter . . . .

(b) No supplier shall engage in any form of discrimination among purchasers of any allocated product. For purposes of this paragraph, "discrimination" means extending any preference or sales treatment which has the effect of frustrating or impairing the objectives, purposes and intent of this chapter or of the Act. . . .

(c) Any practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter or to impose terms or conditions not customarily imposed upon the sale of allocated product is a violation of these regulations. . . . .

At trial, without objection by Clark, Go-Tane maintained that it was not until June 1974, a time within the five year limitation period, that it was first unable to purchase its full allocation from Clark.[8] Certainly no action for such allocation damages could have been maintained before any allocation damage had occurred. It would be a perversion of the doctrine of limitations to conclude that a claim otherwise valid would become outlawed before it could be brought. We reject Clark's argument that before June, 1974, Go-Tane could have at least sought an injunction to prevent the occurrence of future allocation damage as without legal significance.

When an unlawful act does not immediately cause the injury sued for, but does so at a subsequent point of time, a plaintiff's cause of action does not accrue until injury has occurred. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, *reh'g denied*, 401 U.S. 1015 (1971). In *Oerther v. Pennzoil Co.*, 763 F.2d 420, 422 (TECA

[8] Go-Tane filed two briefs with the trial court arguing that whatever the outcome of the price claim on statute of limitation grounds, its allocation claim was not time-barred because that cause of action did not accrue until June, 1974 when Clark's high prices first prevented it from purchasing its allocation. Clark did not respond to either of these briefs on this point; nor did it introduce any testimony at the trial to establish that Go-Tane's initial injury from being deprived its allocation occurred prior to June, 1974. At the trial Clark seemed to rely entirely on its theory that the occurrence of overcharges more than five years before the filing of the action barred both the allocation and the overcharge claim, it having pled the statute of limitations as an affirmative defense only in general and indiscriminately as to all of plaintiff's claim. The pleading of the statute of limitations' defense as to all claims in the second amended complaint was singly in these words:

> Plaintiff did not commence this action within the time permitted by law as provided in § 893.21 (1) of the Wisconsin Statute and Chapter 15 of the Illinois Revised Statutes in that the causes of action accrued prior to the time limitations set forth. App. 63.

1985), a plaintiff had alleged that the defendant's revised pricing structure resulted in overcharges for which it sought recovery. The act which ultimately caused the injury occurred in October, 1973. Overcharges were not actually made until November, 1973. We held that the cause of action did not accrue until the latter month, when the first invoice was submitted pursuant to the improper price structure. *See, e.g., CPI Crude*, 776 F.2d at 1552-53 (similarly differentiating between the time the challenged conduct occurred and the resulting overcharges); *Siegel Oil Co. v. Gulf Oil Corp.*, 556 F. Supp. 302, 308 n.11 (D. Colo. 1982) (stating, "A new cause of action would have accrued as of the date of plaintiff's closure since the injury is additional to and separate from buying gasoline at a high price."), *aff'd*, 701 F.2d 149 (TECA 1983).

Clark continues in effect to insist upon the indivisibility of plaintiff's two claims, although not so directly as it did at trial when it took the position that a suit for the recovery of overcharges was the exclusive remedy for price violation and preempted relief by way of additional consequential injury. Clark's primary reliance upon *Lerner v. Atlantic Richfield Co.*, 731 F.2d 898 (TECA 1984), to support this contention is misplaced. *Lerner* involved only one claim. *Id.* at 900. The plaintiff in *Lerner* did not request recovery of overcharges as well as lost profits. *Lerner* is not inconsistent with the rule that wrongful act plus consequent injury triggers the running of the limitations period, and contains no persuasive indication that the barring of an overcharge claim necessarily bars an allocation claim.

In its rebuttal brief, Clark asserted, for the first time, that the allocation claim, in itself, accrued before April, 1974, at a time barred by the statute of limitations. On appeal Go-Tane moved to strike this portion of Clark's brief. The generally respected rule is that contentions raised for the first time on appeal will not then be heard.

If there had been any question that the first allocation injury occurred prior to June, 1974, Clark should have requested submission of a special interrogatory to the jury. Without such request, the court may be deemed to have made a finding on that issue in accordance with the judgment on the special verdict. Fed. R. Civ. P. 49(a). In any event, we have concluded that there is no substantial evidence in the record to establish that Go-Tane was deprived of its allocation prior to June, 1974. The fact that Go-Tane purchased less than its full allocation during January through March, 1974, is neutralized by its purchase in April and May, 1974 of more than its allotment from Clark.

Clark seeks to place the onus, if not the *onus probandi,* upon the trial court for diverting a proper exploration of the time of the allocation injury by incorrectly applying to it the continuing violation theory which it had improperly applied to the overcharge claim. If there were fault in this respect it was more that of the defendant than the trial court which accepted its arguments. The right judgment otherwise amply supported should not be defeated on the basis of an unproved affirmative defense where the failure of the trial court to more responsively deal with it resulted from defendant's failure to rebut, or even address, the vital point on which the viability of its present position depended in the trial court.

Because the trial record establishes that Go-Tane was not injured by any allocation disruption until June, 1974, less than five years from the time this action was commenced, we believe plaintiff's allocation claim should be deemed not barred. Clark failed both procedurally and substantively to sustain its burden of establishing a viable affirmative defense to the contrary.

IV. *Jury Instructions on Normal Business Practices Rule*

The district court, with respect to the allocation claim, instructed the jury:

In order to prevail, plaintiff must establish each of the following elements by a preponderance of the evidence—

> First: Clark had an obligation to make available to Go-Tane quantities of gasoline on a monthly basis each year from April 25, 1974 through February, 1979, at a lawful price.
>
> Second: Clark failed to offer Go-Tane gasoline at a lawful price because of the practices alleged in the First Claim, [the overcharge or price claim], thereby overcharging Go-Tane under the Refiner Price Rule and discriminating against Go-Tane and circumventing the price and allocation regulations.
>
> Third: Go-Tane failed to purchase the full amount of gasoline to which it was entitled because Clark offered it at a price in excess of the Refiner Price Rule or at a price which did not maintain the customary price differential between Clark's dealers and Go-Tane.
>
> Fourth: Go-Tane was injured.[9]

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[9] The court supplemented, with further instructions:

> In considering whether plaintiff has proven this claim, you must consider the application of the controlling regulations relevant to the allocation and pricing of gasoline. The regulations required a seller to offer to sell gasoline to its customers who purchased during the year of 1972. The number of gallons the seller was required to offer was determined by reference to the number of gallons purchased by that customer during the year of 1972. A seller was required to offer product to its 1972 customers at a lawful price.
>
> To establish the second element, Go-Tane must prove that Clark modified its normal business practices in pricing the product offered to Go-Tane, thereby circumventing the price and allocation regulations, and discriminated against Go-Tane.

[Continued]

Clark objected to these instructions on the grounds that: (1) the claims were time barred; (2) failure to maintain customary price differentials did not violate the normal business practices rule; (3) recouping overcharges is the exclusive remedy for price violations; and (4) the instruction directed the jury to find for Go-Tane.[10]

Except as noted above, Clark did not except to the court's general instructions or definitions, made no request for the submission of additional interrogatories or modification of those submitted by the court, and took no exception to their form or content. It is Clark's primary

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[9] [Continued]

"Discrimination" means extending any preference or sales treatment which has the effect of frustrating the objectives and purposes of the regulations.

Any practice which constitutes a means to obtain a price higher than is permitted by the regulations or to impose terms or conditions not customarily imposed upon the sale of an allocated product is a violation of the regulations.

To establish the third element, Go-Tane must prove either that Go-Tane failed to purchase its full entitlement volumes because Clark overcharged Go-Tane or because Clark failed to maintain the customary price differential which existed on May 15, 1973 between Clark's own dealers and the plaintiff in violation of normal business practices.

[10] Clark also objected on the same grounds to special interrogatories submitted to the jury, including:

(5) Do you find that Go-Tane was entitled to purchase additional amounts of gasoline from Clark and that it did not purchase those amounts either because Clark was charging a price in excess of the Maximum Allowable Price under the Refiner Price Rule or because Clark did not maintain the customary price differential which existed on May 15, 1973, between Clark's own dealers and the plaintiff in violation of normal business practices?

(6) If the answer to question five was "yes," do you find that plaintiff suffered lost profits?

contention on appeal that the maintenance of customary price differentials was not required and that were this not so cost increases in actual selling prices would have to have been uniform or equal contrary to the regulations. For support, Clark cites *Mobil Oil Corp. v. DOE*, 728 F.2d 1477 (TECA 1983), *cert. denied*, 104 S.Ct. 3545 (1984); *McWhirter Distributing Co., Inc. v. Texaco, Inc.*, 668 F.2d 511 (TECA 1981); and *Eastern Airlines, Inc. v. Mobil Oil Corp.*, 735 F.2d 1379 (TECA 1984). These cases do not aid Clark's position; on the contrary, read carefully they support Go-Tane's position.

Clark emphasizes that the "deemed recovery rule" allows unequal application of cost increases in actual selling price which would necessarily change the customary price differential. In *Eastern Airlines* this court stated:

> This "equal pass-through" provision does not, however, establish the prices that must be charged by a refiner. Rather, it affects the maximum price, at that time in the regulations referred to as the "base price," that could lawfully be charged under the regulatory system. Moreover, the subsequent promulgation of the "deemed recovery rule," as already discussed, had the effect of altering even this requirement—by permitting the unequal application of the increased costs to different classes of purchasers subject to the sanction of reducing the refiner's "bank" of unrecouped costs for purposes of calculating the maximum prices that could be charged in later months.

735 F.2d at 1382. *See also Mobil Oil*, 728 F.2d at 1489-90; *McWhirter*, 668 F.2d at 520. In these cases, consequential damages were not awarded for unequal pass through of costs because no violation of the refiner price rule had been established.

The regulatory preamble to the deemed recovery rule expressly states that unequal cost pass-throughs are permissible "as long as they are undertaken for a pur-

pose and in a manner which does not conflict with § 210.62(b)." 41 Fed. Reg. 30.021-022 (July 22, 1976). This court in *McWhirter* recognized:

> The distributors alleged a violation of the "normal business practices" rule of section 210.62(a) . . . . [A] modification of a "normal business practice" would have violated section 210.62(a) if the result had constituted a circumvention or frustration of its purposes or other regulations. Support for this view once again may be found in the preamble to section 212.83(h), recognizing that section 210.62(a) places limitations on a supplier's rights under section 212.-83(h) by prohibiting modifications of normal business practices that would "circumvent the purposes of today's amendments."

668 F.2d at 523. In *Eastern Airlines* we held that damages could not be recovered because there had been no violation of the refiner price rule:

> The sole basis for Eastern's claim for discrimination under 210.62(b) is that it was charged prices which, although less than the ceiling prices, were greater than those charged another member of the same class of purchaser. Eastern does not contend that it failed to receive any products from Mobil. . . .

735 F.2d at 1383.

The case now before us differs from *Eastern Airlines* and *McWhirter* in one vital respect. The price charged Go-Tane and its class was not only higher than that charged another class, consisting of Clark's own branded dealers in reversal of the historical price differential, but was so high as to amount to an unlawful overcharge. The record sufficiently demonstrates that Clark's use of an August 20 WASP prevented Go-Tane from purchasing its full allocation of gasoline in violation of § 210.62, and was not excused by the deemed recovery rule.

In *McWhirter* we expressly rejected Texaco's argument that section 212.83(h) embodied such a balancing of

EPAA's goals as to preclude related claims under the General Allocation and Pricing Rules. We now reject Clark's corresponding argument that the Refiner Price Rule balanced all EPAA's goals by providing a single remedy of recovering overcharges for departure from the normal business practices where the departure is itself illegal and additional injurious consequences have proximately resulted, as in the present case.

It is true that the legality of the alteration of the price differential and departure from normal business practices was not presented comprehensively as an issue for the jury. It did not need to be. The conclusion of illegality was a matter of law adequately indicated in the court's judgment on the verdict, in the light of the jury's determination of the remaining factual issues after the stipulated and uncontroverted facts were taken into consideration. Beyond its determination that the overcharges were unlawful, the jury expressly found as to count five that Go-Tane was entitled to purchase additional amounts of gasoline under its allotment from Clark and that it did not do so because Clark was charging a price in excess of the maximum allowable price under the Refiner Price Rule or because Clark did not maintain the customary price differential which existed on May 15, 1973, between Clark's own dealers and Go-Tane, in violation of normal business practices. As a result Go-Tane suffered lost profits in a stated amount beyond any damages recoverable by virtue of its overcharge claim. The jury was not directed to find for Go-Tane.

V. *Admissibility of Expert Testimony*

Clark contends that the district court abused its discretion in permitting Go-Tane's expert to testify on the computation of damages. Clark argues that Go-Tane failed to seasonably supplement discovery responses, as required by Fed. R. Civ. P. 26(a), and that this failure mandated the exclusion of the expert's testimony.

We do not approve the delayed, circumventive and grudging responses by Go-Tane to some of Clark's interrogatories and its belated correction of information furnished. Nor was Clark's failure to effectively meet this situation by timely remedial countermeasures a model of advocatory resourcefulness.

No useful purpose would be served in retracing the trails and tactics of the respective parties as they seek to do in their briefs; nor to review the factors that should be considered in determining whether discovery irregularities justify witness preclusion. This, in many respects, would be a rerun of *Kickapoo Oil Co. v. Clark Oil & Refining Corp.*, 788 F.2d 11 (TECA 1985).

In *Kickapoo* we held that the preclusion of the testimony of an expert witness for inadequate discovery responses did not constitute an abuse of discretion on the part of the trial judge. It is interesting to observe, and only to a degree significant, that the expert witness in *Kickapoo* was the same witness in the case now before us, that counsel for Kickapoo was Go-Tane's present counsel, and that the same attorney represented Clark in both cases. Despite the long drawn out proceedings in both cases, it would be fair to note that our decision in *Kickapoo* was filed after the trial of the present case.

Suffice it to say that the trial judge in the case at bar generally applied the criteria later reviewed in *Kickapoo,* recognized that there were considerations before him that appear not to have been present in *Kickapoo,* appropriately observed that Clark's counsel seemed to know more about the expert's testimony than he had professed in his objection, later confirmed by his searching cross-examination, and reasonably weighed the relevant circumstances bearing upon the drastic remedy of preclusion. *See, e.g., Dudley v. South Jersey Metal, Inc.,* 555 F.2d 96 (3d Cir. 1977). We cannot say that the district court's allowance of the expert's testimony at trial constituted an abuse of discretion.

VI. *Conclusions*

We have considered the other arguments and supplemental points presented in Clark's briefs and argument and find them to be without merit in militating against the conclusions reached here.

As to the pricing claims for overcharges, the judgment is reversed and the case is remanded with directions to dismiss those claims with prejudice. As to the allocation claim, the judgment is affirmed.

Reversed in part and affirmed in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GO-TANE SERVICE STATIONS, INC., *Plaintiff,*	)	
v.	)	No. 79 C 1674
CLARK OIL & REFINING CORP., *Defendant.*	)	

MEMORANDUM OPINION AND ORDER

On April 25, 1979, Go-Tane Service Stations, Inc. ("Go-Tane") filed this action against Clark Oil & Refining Corp. ("Clark"), seeking reimbursement of amounts Clark charged Go-Tane for purchases of gasoline, allegedly in excess of prices permitted under then existing Federal Energy Administration ("FEA") regulations. 10 C.F.R. Parts 210-212 (1973). Go-Tane also seeks damages allegedly resulting from Clark's overcharges, including the statutory trebling of damages for intentional violations of the price regulations (Counts V and VI).

In its second amended complaint, Go-Tane sets forth four separate violations of the price regulations, each of which contributed to the alleged overcharges. In Count I, Go-Tane contends that Clark failed to preserve the customary price differentials that the FEA regulations were implemented to protect. Go-Tane asserts that by placing Go-Tane in an improper "class of purchaser" and setting an inflated May 15, 1973 baseline price, Clark overcharged certain wholesalers relative to its other customer classes. Count II attributes a portion of the overcharges to Clark's failure to abide by the "refiner's price rule," which dealt with the amount of post-May 15, 1973 cost increases a refiner could pass on to its customers. Count III maintains that Clark imposed stricter credit terms on

Go-Tane (a form of price increase) after the price regulations took effect. Count IV attributes the overcharges, in part, to Clark's improper recoupment of "banked costs," which were a refiner's unrecovered cost increases that could be carried forward for recovery in subsequent months.

In Count V, Go-Tane alleges that Clark's overcharges constituted violations of the "normal business practices" rule, which caused Go-Tane to purchase and resell less than its full gasoline allocation from Clark. The result of this lower volume of purchases was lost profit on resales by Go-Tane. In Count VI, Go-Tane requests a statutory trebling of these damages and of the overcharges.

By Order dated January 16, 1984, this Court granted Go-Tane's motion to reconsider an earlier denial of its motion for partial summary judgment. Go-Tane's motion seeks summary judgment as to Clark's allegedly improper application of May 15, 1973 baseline prices to Go-Tane's class of purchasers. This charge forms the basis of Count I and also relates to Counts V and VI. In response, Clark has filed a cross-motion for summary judgment, arguing that applicable statutes of limitations bar these claims, as well as other portions of Go-Tane's complaint.

Regulatory and Factual Background

Go-Tane is a gasoline wholesaler, purchasing gasoline from refiners, such as Clark, for resale under its own name through its retail service stations. Clark, in addition to its operation of retail service stations, sells gasoline to "unbranded" wholesalers, including Go-Tane, at four locations: Blue Island, Illinois; Hammond, Indiana; Peoria, Illinois; and Wood River, Wisconsin. On all sales to Go-Tane, Clark had offered credit terms including a 1% discount on invoices paid within 10 days of receipt. Clark sold gasoline to Go-Tane until May 1, 1973, when Clark discontinued sales to all wholesale purchasers. However, sales to a single wholesaler continued from May 9, 1973 through May 18, 1973 as a result of an *ex parte* temporary restraining order entered in an antitrust action.

When federal price regulations for gasoline took effect on August 20, 1973, the price charged to wholesalers for gasoline during this period of time became critical. Under these price regulations, the starting point for calculating the maximum allowable price for gasoline, the "base price" was the "weighted [by volume] average price" lawfully charged to a given "class of purchaser" on May 15, 1973, or, if no sales were made that day, on the next preceeding date on which a sale was made ("May 15th prices"). 10 C.F.R. § 218.82(f)(1). The second component of the "base price" was the "increased product costs incurred between" the month in which a subsequent sale was made and the month of May, 1973. *Id.* Thus, both components of "base price" were pegged to May 15th prices.[1]

Further regulations, effective January 15, 1974, required refiners such as Clark to allocate gasoline pro rata among its customers, based upon volumes they purchased in corresponding months of the base year, initially 1972. Therefore, despite its May 1, 1973 decision to end sales to the unbranded wholesalers, Clark became obligated to resume sales to these customers. At least as to Go-Tane, Clark had resumed its sales prior to the effective date of the allocation regulations. Go-Tane's first purchase of gasoline from Clark was made on August 20, 1973.[2] On sales subject to this date, Clark did not offer any discount for early payment.

The per gallon prices charged to unbranded wholesalers on August 20, 1973, the first day on which price regulations were in effect, was as follows:

Terminal	Regular	Premium
Blue Island	$.20871	$.22580
Hammond	$.20871	$.22580
Peoria	$.16650	$.19150
Wood River	$.16000	$.18500

Go-Tane alleges, and Clark concedes, that Clark's per gallon May 15th prices for unbranded wholesalers, were as follows:

Terminal	Regular	Premium
Blue Island[3]	\$.1300	\$.1475
Hammond	\$.1300	\$.1475
Peoria	\$.1335	\$.1515
Wood River	\$.1375	\$.1575

However, in all of its base price calculations, Clark used the August 20, 1973 posted prices as its starting point, rather than the May 15th prices mandated by the regulations.

Since Go-Tane purchased gasoline from other refiners as well as Clark, it quickly became aware that the nearly \$.08/gallon price increase it had encountered with Clark was atypical. Mr. E.V. Silveri, a vice-president of Go-Tane, stated that he complained to "every person that I could and who would listen to me in the company [Clark]" about the price increases. Further evidence of improper pricing by Clark was available to Go-Tane from former Clark employees working for Go-Tane. These former Clark employees knew the prices Clark charged its own retail service stations both prior to and after the effective dates of the price regulations. From these sources of information, Mr. Silveri concluded, prior to the end of 1973, that "the class of purchaser [differential] had been totally destroyed."

Despite this conclusion, Go-Tane continued to purchase gasoline from Clark until February 13, 1979, when Go-Tane agreed to release Clark from its regulatory duty to supply Go-Tane. On December 22, 1978, Go-Tane sent a so-called "90-day letter" to Clark, demanding a refund of the overcharges complained of in this action.

Discussion
Statute of Limitations

The parties do not dispute the applicable limitation periods. Since the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904, under which Go-Tane brings this action, contains no express limitation period, the forum state limitation period is to be applied. *See Colorado Petroleum Products Co. v. Husky Oil. Co.*, 646 F.2d 555 (TECA 1981). The Illinois limitations period applicable to compensatory claims under the ESA (Counts I-V) is the five year period for actions on written contracts and all civil actions for which no period is otherwise provided. Ill. Rev. Stats. ch. 110, § 13-205. Treble damage claims brought pursuant to ESA section 210 (Count VI) are subject to the two year limitation period governing statutory penalties. Ill. Rev. Stat. ch. 110, § 13-202.

Although the parties agree as to the applicable limitations period, they are at issue over the point at which the period begins to run, as well as when, and if, it is tolled. In two recent decisions, the temporary Emergency Court of Appeals ("TECA") has made definitive rulings[4] on the issue of when the statute of limitations begins to run in various price overcharge actions. *Western Mountain Oil, Inc. v. Gulf Oil Corp.*, 726 F.2d 765 (TECA 1983); *Fleetwing Corp. v. Mobil Oil Corp.*, 726 F.2d 768 (TECA 1983). Both the *Western Mountain* and *Fleetwing* cases involved overcharge claims based on the refiner's placement of the plaintiffs in an improper customer class. In each case, the TECA found that the violation claimed was actually the initial decision to classify improperly a customer, rather than a series of repeated injurious overcharges based upon the initially improper classification.

Two of Go-Tane's claims are governed by the teaching of *Western Mountain* and *Fleetwing.* Count III is based on Clark's decision not to offer, after August 20, 1973, a 1% early payment discount to wholesalers, as had been its prior pricing practice. During the period for which price regulations were in effect, Clark was unwavering in its refusal to renew its 1% early payment discount for wholesalers. Go-Tane was aware of Clark's decision upon its receipt of Clark's first invoice, which carried no discount. Go-Tane received that invoice well before April 25, 1984, the date five years

prior to the filing of the complaint in this action. Therefore, Count III is barred by the statute of limitations. *See Shell Oil Co. v. Nelson Oil Co.*, 627 F.2d 228, *cert. denied*, 449 U.S. 1022 (1980).

The claims contained in Count I are even more similar to those with which the TECA dealt in *Western Mountain* and *Fleetwing*, and are also barred by the statute of limitations. In Count I, Go-Tane challenges Clark's decision to use its August 20, 1973, prices rather than its May 15th prices, as the first component in its "base price" calculation. The gravamen of Count I is that Clark failed to maintain the customary price differential between the class of purchaser to which Go-Tane belonged and other classes of purchasers. The record in this case reveals that during the latter half of 1973, Go-Tane became aware of the challenged practice. Further, Clark listed the price it had determined to be its May 15th price on reports submitted to the FEA on January 7, 1974 (form FEO-96). Thus, Go-Tane's complaint is untimely. *Lerner v. Atlantic Richfield Co.*, 731 F.2d 898 (TECA 1984).

Go-Tane contends that Clark's decision as to the first component of the "base price" charged to wholesalers was not "final" until November 4, 1984, well within the limitations period. Go-Tane bases its contention on internal memoranda in which certain Clark management personnel reevaluated Clark's determination of its May 15th prices. Any *internal* reevaluation by Clark is of little moment. After August 20, 1973, Clark continued to manifest to the outside world that its decision as to May 15th transaction prices was final. In the face of heated protests from Go-Tane, Clark steadfastly maintained its price levels, so that, as to Go-Tane, Clark's decision was final. *Siegel Oil Co. v. Gulf Oil Corp.*, 701 F.2d 149, 153 (TECA 1983).

Go-Tane also argues that the statute of limitations was tolled on December 22, 1978, when Go-Tane sent its "90-day" demand to Clark. *See* 12 U.S.C. § 1904. Before bringing suit for a refund of alleged overcharges, the ESA requires a prospective plaintiff to send a demand for refund to its supplier and allow the supplier 90 days in which to settle the overcharge claim. Based on the purportedly analogous filing of a charge with the Equal Employment Opportunity Commission ("EEOC"), which tolls the limitation

period for claims under Title VII, 42 U.S.C. § 2000e, Go-Tane argues that its letter to Clark tolled the limitations period. EEOC filings do more than simply notify the party charged of the alleged violation. Such filings are part of a detailed administrative procedure that limits the time in which a putative plaintiff may sue. Once the plaintiff receives a "right to sue letter" from the EEOC, an action *must* be initiated within 90 days or the claim is barred. 42 U.S.C. § 2000e-5(f)(1). In contrast to this fixed time frame, the "90-day" demand made by Go-Tane is rather open-ended. There is no requirement that an action under the ESA be brought within a given time after the "90-day" letter is sent. Go-Tane itself delayed just over one month beyond the 90-day period before filing this action. Therefore, the TECA has looked, as will this Court, to the date on which a demand for refund is made. *See Western Mountian,* 726 F.2d at 766; *Fleetwing,* 726 F.2d at 770; *Lerner,* 731 F.2d at 900; *Ashland Oil Co. v. Union oil Co.,* 587 F.2d 984, 987 (TECA 1977), *cert. denied,* 435 U.S. 994 (1978). *See also Independent Oil & Tire Co. v. Petroleum Co.,* 555 F.Supp. 633, 639 (N.D. Ohio 1982).

Go-Tane's effort to toll the limitations period with allegations of fraudulent concealment must be similarly rejected. Based on Clark's resubmission of certain cost data in 1979, Go-Tane maintains that until the filing of this action it was unable to compute the *amount* of the overcharges incurred. Whether Go-Tane was or was not able to compute the exact amount of its claim is irrelevant. The record demonstrates that by the end of 1973, Go-Tane knew that it had a claim against Clark and it knew of the nature of the overcharges. This knowledge was sufficient to bring suit, and so Go-Tane cannot rely upon any "concealment." *See Ashland Oil,* 567 F.2d at 987 n.4 and 989 n.10.

The remainder of Go-Tane's overcharge claims (Count II - violation of "refiner's price rule;" Count IV - improper recovery of "banked costs,") are in the nature of "plain" overcharges. Recovery on these claims is limited to overcharges resulting from the second component of "base price" and occurring on or after April 25, 1974. The claim for lost profits contained in Count V is limited in this same manner. *Johnson Oil Co. v. U.S. Department of Energy,* 690 F.2d 191, 196 (TECA 1982). Further, the

claim for treble damages in Count VI is limited to overcharges resulting from the second component of "base price" and occurring on or after April 25, 1977. Go-Tane's motion for partial summary judgment is necessarily denied.

IT IS THEREFORE ORDERED that

1. Plaintiff's motion for partial summary judgment is denied.

2. Defendant's motion for summary judgment is granted in part and denied in part. Counts II, IV, V and VI are limited as stated above. On Counts I and III, judgment will enter in favor of Clark Oil & Refining Corp. and against Go-Tane Service Stations, Inc.

3. A status hearing is set for June 26, 1984 at 9:00 a.m.

ENTER:

/s/ WILLIAM T. HART
UNITED STATES DISTRICT JUDGE

Dated: June 7, 1984

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[1]These regulations were abolished on January 27, 1981.

[2]Until December 1, 1983, Clark was subject to the "refiner/reseller price rule," under which Go-Tane concedes its sales to Go-Tane were within lawful maximum prices. Commencing December 1, 1973, Clark became subject to the refiner price rule, upon which Go-Tane bases its overcharge claims.

[3]Including the Court ordered sales during the period May 9-18th raises the Blue Island prices to \$.1575 for Regular and \$.1775 for Premium.

[4]Since appeals from this Court in actions under the ESA are taken to TECA, its decisions are controlling authority for this Court in ESA actions.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

GO-TANE SERVICE STATIONS, INC., *Plaintiff*,	)	
v.	)	No. 79 C 1674
CLARK OIL & REFINING CORP., *Defendant*.	)	

ORDER

Defendant Clark Oil & Refining Corporation ("Clark") has filed a motion in limine, asking that plaintiff Go-Tane Service Stations, Inc. ("Go-Tane") be precluded from introducing at trial certain evidence of the actual prices Clark charged independent wholesalers for gasoline. In a Memorandum Opinion and Order dated June 7, 1984 (the "June 7th Order") this Court dismissed as time barred two counts of Go-Tane's six-count complaint and also limited recovery on the remaining four counts to overcharges, damages and lost profits suffered within the relevant limitations period and "resulting from the second component of 'base price.'" *Go-Tane Service Stations, Inc. v. Clark Oil & Refining Corp.*, 79 C 1674, Slip op. at pp. 10-11 (N.D. Ill. June 7, 1984). Clark maintains that this language requires Go-Tane to accept the prices Clark charged on August 20, 1973. Go-Tane wishes to introduce evidence of the "May 15th prices," as that term is defined by the relevant regulations.

In the June 7th Order, the Court noted that petroleum pricing regulations then in effect defined the maximum allowable legal price, or "base price," for a product in terms of two components. The regulations defined the first component of "base price" for a product as the weighted [by volume] average price lawfully charged

to a given "class of purchaser" for that product on May 15, 1973, or, if no sales were made that day, on the next preceding date on which a sale was made. 10 C.F.R. § 218,82(f)(1). The Court referred to this component of "base price" as "May 15th prices" or "baseline prices." The second component of "base price," as defined by the regulations, consisted of increased product costs incurred between the month in which a subsequent sale was made and the month of May, 1973.

The parties have stipulated that: (i) on August 20, 1973, the first day on which price regulations were in effect, Clark charged Go-Tane a price nearly $.08/gallon higher than its "May 15th prices," and (ii) used this higher August 20, 1973 posted price ("August 20th prices") as its "baseline price" in all subsequent "base price" calculations. The Court based its findings in part on these stipulations, as well as the testimony of one of Go-Tane's vice-presidents and Clark's January 7, 1974 filing of its "base price" calculations with the Federal Energy Administration ("FEA").

The main thrust of the June 7th Order is that since Go-Tane slept on its rights, it cannot now challenge Clark's use of the higher August 20, 1973 prices as "May 15th prices." Go-Tane's claims set forth in Counts II, and IV-VI were limited to prevent Go-Tane from advancing a series of claims categorized as "banked cost," "willful overcharge," "improper cost increase allocation," and "normal business practices" when in fact each of them might be based *solely* upon the same conduct of Clark. *Lerner v. Atlantic Richfield Co.*, 731 F.2d 898, 901 (T.E.C.A. 1984). Should Clark be able to demonstrate at trial that "any overcharges incurred by Go-Tane resulted solely from Clark's initial decision to utilize an improper baseline price, Clark would be entitled to a directed verdict based on the statute of limiations. *See Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 809 (T.E.C.A. 1984).

However, should Go-Tane be able to demonstrate that a particular overcharge resulted from some additional error or misconduct by Clark, then Go-Tane will not be limited to Clark's August 20th prices. The Court is guided by the teaching of *Longview Refining Co. v. Shore*, 554 F.2d 1006 (T.E.C.A.), *cert. denied*, 434 U.S. 836 (1977) and *Johnson Oil Co. v. D.O.E.*, 690 F.2d 191, 196

(T.E.C.A. 1982). In *Johnson Oil,* the Court of Appeals found that claims for "plain overcharges" accrue when the buyer is actually overcharged. In *Longview Refining,* the Court of Appeals found that an error in the calculation of one component of the "base price" figure does not itself constitute an overcharge. Hence, forcing Go-Tane to accept Clark's August 20th prices for the purpose of "base price" calculations on its "plain overcharge" claims is contrary to *Longview Refining* since it would limit proof at trial to one component of the base price calculations, which cannot alone give rise to an overcharge claim. The limitation Clark suggests would have the effect of impermissibly splitting Go-Tane's cause of action with the statute of limitations.

IT IS THEREFORE ORDERED that

(1) Clark's motion in limine is denied. At trial, Go-Tane will be permitted to introduce evidence of any price charged within the relevant limitation period which exceeds "base price," as defined in the relevant regulations.

(2) The time for presentation of further pretrial materials, modified jury instructions and summaries of expert testimony (both the experts' opinions and the bases for those opinions), is reset from July 26, 1984 to August 30, 1984 at 9:00 a.m.

ENTER:

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: July 26, 1984

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 7-16

GO-TANE SERVICE STATIONS, INC.
Plaintiff-Appellee,

v.

CLARK OIL & REFINING CORPORATION,
Defendant-Appellant.

Before: CHRISTENSEN, JAMESON, and MAXWELL, Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Illinois, Eastern Division and was argued by counsel. In consideration whereof, it is

ORDERED that the part of the district court judgement regarding pricing claims for overcharges is REVERSED and the case is REMANDED with directions to dismiss those claims with prejudice.

It is FURTHER ORDERED that the part of the district court judgement regarding the allocation claim is AFFIRMED.

FOR THE COURT:

DONNA M. BOLD, Clerk

By: /s/ Sharon A. Bollinger
Sharon A. Bollinger
Deputy Clerk

July 31, 1986

(District Court Civil Action No. 79-C-1674

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 7-16

GO-TANE SERVICE STATIONS, INC.
Plaintiff-Appellee,

v.

CLARK OIL & REFINING CORPORATION,
Defendant-Appellant.

Before: CHRISTENSEN, JAMESON, and MAXWELL, Judges.

ORDER

Upon consideration of Appellant's petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED that said petition for rehearing is DENIED.

It is FURTHER ORDERED that the suggestion for rehearing *en banc* is DENIED. The Court's mandate shall issue seven days from the date of this order — Monday, September 22, 1986.

FOR THE COURT:

DONNA M. BOLD, Clerk

By: /s/ Cynthia Ann Dykes
Chief Deputy Clerk

September 15, 1986

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GO-TANE SERVICE STATIONS, INC.,

v.

CLARK OIL & REFINING CORP.,

JUDGMENT IN A CIVIL CASE

Case Number: 79 C 1674

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff, Go-Tane Servcie Stations, Inc. and against the defendant, Clark Oil & Refining Corporation, in the total amount of THREE MILLION, TWO HUNDRED FORTY-SEVEN THOUSAND, ONE HUNDRED THIRTY-THREE DOLLARS and NO CENTS, ($3,247,133.00).

November 8, 1985
Date

H. STUART CUNNINGHAM
Clerk

/s/ William J. Stasiek
WILLIAM J. STASIEK
(By) Deputy Clerk

STATUTES

ECONOMIC STABILIZATION ACT OF 1970

(Pub.L. 91-379, 84 Stat. 799, as amended by Pub.L. 92-210, § 2, 85 Stat. 743, 12 U.S.C. § 1904 note (1980))

§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

* * *

§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases of controversies arising under this title, or under regulations of orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

* * *

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

(Pub.L. 93-159, § 5, 87 Stat. 633,
later codified at 15 U.S.C. § 754 (1976))

Sec. 5. (a)(1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

* * *

ILL. REV. STAT. CH. 110 (1982)

13-205. Five year limitation

Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not other wise provided for, shall be commenced within 5 years next after the cause of action accrued.

FEDERAL REGULATIONS

General Allocation and Price Regulations (excerpts)

(10 C.F.R. Part 210, as published in 39 Fed. Reg. 1924 at 1931 (January 15, 1974) unless otherwise noted)

§ 210.1 Purpose.

The purpose of this part is to set forth the provisions applicable to both Parts 211 - Mandatory Petroleum Allocation Regulations and Part 212 - Mandatory Petroleum Price Regulations, appearing in this chapter.

§ 210.62 Normal business practices.

(a) Suppliers will deal with purchasers according to normal business practices. Nothing in this program shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for products. However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (e.g. COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this chapter.

(b) No supplier shall engage in any form of discrimination among purchasers of any allocated product. For purposes of this paragraph, "discrimination" means extending any preference or sales treatment which has the effect of frustrating or impairing the objectives, purposes and intent of this chapter or of the Act, and includes, but is not limited to refusal by a retail marketer of motorgasoline or diesel fuel to furnish or sell any allocated product due to the absence of a prior selling relationship with the purchaser, or establishment of new volume purchase arrangements where customers of retailers agree in advance to purchase in excess of normal amounts of motor gasoline or diesel fuel and thereby receive preferential treatment. (As published in 39 Fed. Reg. 5311 (February 12, 1974)).

Mandatory Petroleum Allocation Regulations (excerpts)

(10 C.F.R. Part 211, as published in
39 Fed. Reg. 1924 at 1933-36 (January 15, 1974))

Subpart A — General Provisions

* * *

§ 211.11 Method of allocation

Unless otherwise specified in subparts D through K of this part the method of allocation for each product shall be as follows:

(a) *Allocable supply.* Each supplier's total allocable supply for each allocated product shall be equal to the sum of its estimated production, imports, and purchases and its inventory adjustments for the allocated product less the quantities set aside for distribution by the State Offices if they, as a prime supplier, are required by § 211.17 to establish a State set-aside volume.

(b) *Sales to wholesale purchasers.* Suppliers shall allocate their total allocable supply among their wholesale purchasers in proportion to their wholesale purchaser's base period volumes, or adjusted base period volumes, where applicable.

* * *

§ 211.24 Supplier/Purchaser relationships

(a) Changes in ownership of a supplier or wholesale purchaser shall not alter supplier/purchaser relationships defined by specific dates or base periods in this part. The right to receive an allocation is non-assignable unless that right is transferred as an internal part of an on-going business or an established end-use.

(b) Suppliers and purchasers who have gone out of business shall not be eligible for allocations based upon volumes of purchases, sales or exchanges prior to going out of business.

(c) No end-user shall be supplied or shall accept quantities of allocated substances which exceed one hundred (100) percent of his current requirements unless otherwise allowed in this part as directed by the FEO.

(d) Any parties mutually terminating their supplier/purchaser relationship pursuant to this part shall reduce their agreement to writing and shall provide prior written notification to those wholesale purchasers affected thereby.

Subpart B — Definitions

§ 211.51 General Definitions

* * *

"Base period" means the historical period designated in Subparts C through J of this part.

"Base period volume" means, for a purchaser, for any allocated product, his volume of purchases from his suppliers during the base period. The "base period volume" of a supplier, for any allocated product, means the sum of the base period volumes of all of his purchasers.

* * *

Subpart F — Motor Gasoline

§ 211.101 Scope

(a) This subpart applies to the mandatory allocation at the wholesale level of all motor gasoline produced in or imported into the United States.

(b) This subpart provides for a State set-aside of motor gasoline.

§ 211.102 Definitions.

For the purposes of this subpart —

(a) "Base period" for motor gasoline means the month of 1972 corresponding to the current month.

§ 211.103 Allocation levels.

(a) The percentage allocation levels listed in this paragraph are for end-users who are bulk purchasers or wholesale purchasers and are not arranged in sequence of priority. Suppliers shall distribute available supplies of motor gasoline to all classifications of purchasers listed within each particular percentage allocation level and among percentage allocation levels without regard to the order of listing.

(1) One hundred (100) percent of current requirements for the following uses:

(i) Agricultural production;
(ii) Emergency services;
(iii) Energy production;
(iv) Sanitation services;
(v) Telecommunication services;
(vi) Passenger transportation services.

(2) One hundred (100) percent of base period volumes use for all other business activities.

(b) There shall be no allocation levels for end-users not described in subsection (a).

§ 211.104 Supplier/purchaser relationships.

(a) All suppliers of motor gasoline shall supply their wholesale purchasers of record as of the base period.

(b) Unless otherwise specified, supplier/purchaser relationships are set forth in § 211.24.

§ 211.105 Method of allocation.

(a) The initial State set-aside level for motor gasoline is three (3) percent of all motor gasoline produced in or imported into the United States. Subsequent adjustments to the percentage unit will be published by the FEO.

(b) Allocation of motor gasoline shall be made as specified in § 211.11.

(c) Provisions to increase a supplier's or a wholesale purchaser's base period volume to allow for new customers, and the increased requirements of his customers, are specified in § 211.13.

§ 211.106 Procedures and reporting requirements.

(a) All matters pertaining to the allocation of motor gasoline shall be addressed to the appropriate State office or regional FEO office as specified within this part.

(b) The general reporting and recordkeeping requirements contained in § 211.222 shall apply to this subpart.

(c) If undue hardship to any wholesale purchaser or end-user results from the provisions of this subpart, a hardship application shall be submitted to the appropriate State office as provided in § 211.16.

Mandatory Petroleum Price Regulations (excerpts)

(10 C.F.R. Part 212, as published in
39 Fed. Reg. 1924 at 1950-53 (January 15, 1974))

§ 212.31 Definitions.

* * *

"Class of purchaser" means purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees.

* * *

"Customary price differential" includes a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

* * *

§ 212.82 Price rule.

(a) **Rule.** A refiner may not charge to any class of purchaser a price in excess of the base price of that covered product except to the extent permitted pursuant to the provisions of paragraphs (c) through (k) of this section.

* * *

(f) **Base price - (1) General rule** (i) The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus (a) increased product costs incurred between the month of measurement and the month of May 1973 and measured pursuant to the provisions of § 212.83 and (b) the refiner incentive factor calculated and permitted pursuant to the provisions of § 212.84. In computing the base price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973.

* * *